

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

NO. 77-4142

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

MIGUEL SIMMS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

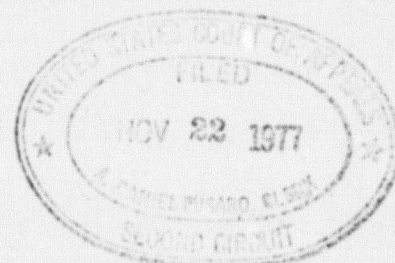
BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board properly concluded that the Union did not violate Section 8(b)(1)(A) of the Act by initiating and conducting intraunion disciplinary proceedings against Miguel Simms for filing charges with the Board, where the International Union ultimately sustained Simms' right to file the charges and made a clear and unequivocal statement of its members' right under the Act to complain to the Board, and the prior proceedings did not adversely affect Simms.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Miguel Simms, the charging party below, to review an order of the National Labor Relations Board ("the Board") dismissing in its entirety a complaint against Local 100,

Transport Workers Union of America, AFL-CIO ("the Union"). The Board's Decision issued on June 27, 1977, and is reported at 230 NLRB No. 83.^{1/} This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq., "the Act"). Petitioner is aggrieved by the Board's final order denying in whole the relief sought, and the unfair labor practice is alleged to have occurred in the State of New York.

I. THE BOARD'S FINDINGS OF FACT

Miguel Simms was discharged from his employment at Liberty Coaches, Inc., on May 11, 1976 (ALJD 2; Tr. 102). Liberty Coaches, Inc., was party to a collective bargaining agreement with the Union, and Simms was a member of the Union during his employment at Liberty Coaches, Inc. (ALJD 2; Tr. 102, GCX 1(c), 1(d)). Simms filed a grievance protesting his discharge, and the Union submitted the grievance to arbitration (ALJD 2; Tr. 102, GCX 1(d), Attachment C). The arbitrator's award sustaining the discharge issued on August 17, 1976 (ALJD 2; Tr. 102, GCX 1(d), Attachment C).

^{1/} The Board has transmitted the record in this case to the Court, in lieu of a printed appendix, which the pro se petitioner was unable to provide. "Bd." references are to the Board's Decision and Order, and "ALJD" references are to the Decision of the Administrative Law Judge, both of which are contained in the "Volume III, Pleadings". Three additional copies of the decisions have been provided with the record. "Tr." references are to the stenographic transcript of the hearing before the Administrative Law Judge. "GCX" and "RX" refer to the General Counsel's and the Respondent-Union's exhibits, respectively. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Prior to his discharge, Simms had filed two unfair labor practice charges against the Union—one on December 17, 1975, (Case number 2-CB-6107) and the other on May 6, 1976 (Case number 2-CB-6253) (ALJD 4, n. 3; GCX 7, GCX 9). The first charge was withdrawn on February 26, 1976, and the second was dismissed on June 10, 1976 (ALJD 4, n. 3; GCX 7, GCX 9).

On June 9, 1976, the Union's section chairman, Cosmo De'Alesio, filed intraunion charges against Simms for seven alleged violations of the Union constitution and by-laws (ALJD 3; Tr. 23, 35, GCX 2, GCX 3). On June 21, 1976, Union Organizer Kevin McGarvey filed a second set of intraunion charges against Simms, alleging:

- 2/26/76 - Violation of Article 19, Section 5c
(Constitution) National Labor Relations
Board Case # 2 C.B. - 6107
- 6/10/76 - Violation of Article 19, Section 5c
(Constitution) Violation of Article 17b,
(By-laws)

Filed charge before NLRB against local of violating
section 8, National Labor Relations Act.

(ALJD 3-4; Tr. 44, GCX 4). Article 19, Section 5c, of the Union's Constitution, relating to discipline, provides that "conduct unbecoming a member of the Union" includes (ALJD 7-8; RX 2 at p. 59, 61-62):

Maliciously instituting, or urging or advocating that a member of any Local Union institute action in a court against the International Union or any of its officers or against any Local Union, or any of its officers without first exhausting all remedies through the forms of appeal of the International Union.

On July 1, 1976, a Union committee held a hearing with respect to both the De'Alesio and McGarvey charges against Simms and with respect to charges which had been filed by Robert Martin (ALJD 4; Tr. 23, 29-30, GCX 5). A report of the hearing was prepared the next day, reviewing the events of the hearing and stating the conclusion and recommendations of the Union committee, which were that Simms was guilty of all the charges submitted and that he should be barred from ever holding Union office and should be placed on five year probation (ALJD 4-5; Tr. 23, 29-30, GCX 5).

On July 7, 1976, the Union's Executive Board met and considered the committee report on the July 1, 1976, hearing (ALJD 6; Tr. 28-30, 34, GCX 5). The Executive Board unanimously voted to amend the committee findings "to revoke the membership of Miguel Simms from the Transport Workers Union as of July 7, 1976, but in no way to prevent him from working." (ALJD 6; Tr. 30-32, GCX 5). The Union advised Simms of the action taken against him by letter dated August 19, 1976 (ALJD 6; Tr. 29, GCX 6).

Simms appealed from the action of the Union to the International Committee on Appeals in accordance with the provisions of the Constitution of the Transport Workers Union of America, AFL-CIO (ALJD 6; Tr. 10, GCX 1(d), RX 2, at p. 66-67, 69-71). The International Committee on Appeals reversed the action of the Union expelling Simms, and by letter dated October 7, 1976, the International vice president and acting chairman of the Committee on Appeals notified Simms of the Committee's decision and of the adoption of the decision by the TWU's International Executive Council (ALJD 6; Tr. 10-11, GCX 1(d), RX 1). A copy of the Committee's decision was transmitted with the letter to Simms (ALJD 6; RX 1).

The decision of the International gave two reasons for rescinding the action of the Union Executive Board expelling Simms. First, it held that the charges filed by De'Alesio and Martin were not sufficiently specific, and, second, it stated:

Furthermore, the charges by Brother McGarvey violated the National Labor Relations Act. A member's right to complain to the National Labor Relations Board is protected by law regardless of the merits of the complaint and this charge by Brother McGarvey is dismissed.

(ALJD 6; RX 1). The International referred the De'Alesio and Martin charges back to the Union Executive Board for clarification and retrial, and stated that no new charges could be added (ALJD 6; RX 1). Finally, the International noted that Simms was no longer employed in the transit industry, pursuant to his discharge by Liberty Coaches, Inc., and the arbitrator's decision upholding the discharge, so that he was not eligible for membership in the TWU, under Article III, Section 1 of the TWU Constitution (ALJD 7; RX 1). Article III, "Eligibility", provides (ALJD 7; RX 2, at p. 4):

SECTION 1. All working men and women, regardless of race, creed, color or nationality, employed in, on or about any and all passenger or other transportation facilities, or public utilities and allied industries, and in any other employment which the International Executive Council decides is appropriately within the jurisdiction of the International Union and of any Local Union are eligible for membership. [Emphasis supplied].

Simms filed the unfair labor practice charge underlying this case on September 7, 1976, after the Union's Executive Board decision to expel him (ALJD 1, 6; GCX 1(a), GCX 6). On October 22, 1976,

after the International's decision rescinding the expulsion, a complaint was issued upon that charge (ALJD 1, 6; GCX 1(c), RX 1).

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board, in agreement with its Administrative Law Judge, found that the final result of the intra-union proceeding was that Simms was not expelled from the Union and that the International made a clear and unequivocal expression of principle that its members have a right under the Act to complain to the Board, and that there was no showing of any irregularity in the intraunion proceedings or of any adverse effect on Simms by the Union's actions prior to the International's decision (Bd. 1, ALJD 10-11). Accordingly, the Board concluded that the Union did not violate Section 8(b)(1)(A) of the Act, and dismissed the complaint in its entirety (Bd. 1-2, ALJD 11).

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE UNION DID NOT VIOLATE SECTION 8(b)(1)(A) OF THE ACT BY INITIATING AND CONDUCTING INTRAUNION DISCIPLINARY PROCEEDINGS AGAINST MIGUEL SIMMS FOR FILING CHARGES WITH THE BOARD, WHERE THE FINAL RESULT OF THE PROCEEDINGS WAS THAT THE UNION'S INTERNATIONAL MADE A CLEAR AND UNEQUIVOCAL STATEMENT OF ITS MEMBERS' RIGHT UNDER THE ACT TO COMPLAIN TO THE BOARD, AND THE PRIOR PROCEEDINGS DID NOT ADVERSELY AFFECT SIMMS

It is settled that Section 8(b)(1)(A) of the Act forbids a union to use coercive means to prevent or limit access to the Board's remedial processes. N.L.R.B. v. Local 294, International Brotherhood of Teamsters, 470 F.2d 57, 60 (C.A. 2, 1972), and cases there cited. Neither the proviso to Section 8(b)(1)(A)^{2/} nor Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act ("LMRDA")^{3/} gives a union the right to penalize a member who goes to the Board before exhausting intraunion remedies. N.L.R.B. v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968).

^{2/} Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a union:

to restrain or coerce employees in the exercise of the rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

^{3/} Section 101(a)(4) of the LMRDA (73 Stat. 522, 29 U.S.C. Sec. 411(a)(4)) provides:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency . . . : Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings

Thus, as the Board recognized here (ALJD 1), a union violates Section 8(b)(1)(A) of the Act when it imposes any punishment on a member, or even threatens to penalize a member, for filing an unfair labor practice charge with the Board. N.L.R.B. v. Marine Workers, supra, 391 U.S. 418 (1968); Operative Plasterers' Local 521 (Arthur McKee & Co.), 189 NLRB 553 (1971).

On the other hand, the Board has discretion to withhold its remedial powers while a union member seeks relief within the union. N.L.R.B. v. Marine Workers, supra, 391 U.S. at 426; Plasterers' Local 521, supra, 189 NLRB at 557. The Board has recognized that union rules requiring exhaustion of internal union remedies before going to the Board are not per se unlawful, and that such rules have received Congressional approval in Section 101(a)(4) of the LMRDA because of the role they play in labor relations by reducing the number of actions before agencies and courts. Plasterers' Local 521, supra, 189 NLRB at 556-557. In addition, the Board has acknowledged its responsibility to encourage exhaustion of reasonable intraunion procedures in order to harmonize the policies of the Act with the policies of the LMRDA:

Finally it is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members "to exhaust reasonable hearing procedures" within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function.

N.L.R.B. v. Marine Workers, supra, 391 U.S. at 426 (Justice Harlan concurring), quoted in Plasterers' Local 521, supra, 189 NLRB at 557. Moreover, the

policies underlying agency discretion to require exhaustion of internal union remedies—judicial and administrative economy, and fostering responsible union procedures—are only served if the agency is permitted to recognize effective union remedial action.

The question presented here is whether when "responsible union self-government" has in fact functioned to a final result vindicating its members' rights under the Act before an unfair labor practice complaint has even issued, the Board must still conduct proceedings and find a violation of the Act in the initial stages of the intraunion proceeding which preceded the final union decision.^{4/} We submit that the Board did not abuse its discretion in concluding that there is no violation of the Act in intraunion proceedings which culminate in an affirmation of members' right of free access to the Board under the Act and which have not adversely affected the charging party.^{5/}

^{4/} Petitioner's contention (Br. 6-7) that the Union's decision on the intraunion charges filed by De'Alesio and Martin violated the LMRDA was not raised before the Board (ALJD 1, 10-11; GC Exceptions (in Volume III, Pleadings), GCX 1(c)), and, therefore, is barred from consideration here under Section 10(e) of the Act. See Marshall Field and Co. v. N.L.R.B., 318 U.S. 253, 255 (1943); N.L.R.B. v. Local 294, Teamsters, *supra*, 470 F. 2d at 6162. The only issue before the Board was whether the Union's action on the intraunion charge of Kevin McGarvey against Simms for filing unfair labor practice charges with the Board violated the National Labor Relations Act.

^{5/} Petitioner's assertion (Pet. Br. 7), that "Simms remained as punished as Local 100 had left him" after the decision of the International because he was fired pending the intraunion appeal, is without merit. First, Simms was fired May 11, 1976, before any intraunion charges were even filed (ALJD 2-3; Tr. 102, GCX 1(d), Attachment C). Second, Simms' discharge was upheld by the arbitrator two days before the Local Union's decision purporting to expel him. And finally, there is no record evidence that Simms was ever "punished" by the Union for filing charges with the Board: the ill effect which Simms suffered—ineligibility for Union membership because of his discharge from employment—was not caused by any action of the Union.

Under the circumstances of this case, where the International Committee on Appeals rescinded the Union Executive Board's decision expelling Simms two weeks before the unfair labor practice complaint issued, the Board's conclusion is supported by the policy of the LMRDA to foster responsible union self-government and by the Board's policies of encouraging voluntary compliance with the Act and conserving its limited resources for matters which have real meaning in effectuating the purpose of the Act. N.L.R.B. v. Marine Workers, supra, 391 U.S. at 426, 429; Plasterers' Local 521, supra, 189 NLRB at 556-557; Bellinger Shipyards, Inc., 227 NLRB No. 95, 94 LRRM 1113, 1114 (1976); American Federation of Musicians, Local 76 (Jimmy Wakely Show), 202 NLRB 620, 621 (1973). See also, N.L.R.B. v. Columbia Typographical Union, No. 101, 152 U.S. App. D.C. 365, 470 F. 2d 1274 (1972). It is peculiarly within the province of the Board to decide that prosecution is not warranted for cases involving "small, abstract grievances" which have little or no impact upon employee exercise of statutory rights (American Federation of Musicians, supra, 202 NLRB at 621), because proceedings before the Board are brought, "not to vindicate a private right, but to give effect to the public policy as defined by Congress, . . ." N.L.R.B. v. General Motors Corp., 116 F. 2d 306, 312 (C.A. 7, 1940), cited in N.L.R.B. v. Local 294, Teamsters, supra, 470 F. 2d at 62.

Finally, the Board's conclusion here, that the action of the International on appeal cured the overall Union action of any tendency to coerce Union members in the exercise of their right of free access to the Board's processes, is analogous to the Board's dismissal of complaints under

Section 8(a)(1) of the Act where employer actions expunge the ill effects of low-level supervisory misdeeds or prior unlawful rules. See, for example, Kawasaki Motors Corp., 231 NLRB No. 186, 96 LRRM 1305, 1307 (1977) (Company's voluntary posting of notices disclaiming actions of new supervisor who engaged in unlawful surveillance of union meeting and assuring employees of right to join or not join union adequate to expunge ill effects); Bellinger Shipyards, Inc., supra, 227 NLRB No. 95 (unlawfully broad no-solicitation rule rescinded before complaint issued by General Counsel); General Dynamics, Fort Worth, 145 NLRB 752 (1963) (unlawfully broad no-solicitation rule revised immediately after receiving notification from the Board that rule unlawful).

Since Section 8(b)(1)(A) of the Act was intended to impose upon unions the same restrictions against invasion of employee rights which Section 8(a)(1) imposed on employers (International Ladies' Garment Workers' Union v. N.L.R.B., 366 U.S. 731, 738 (1961)), union hierarchies also should be afforded at least the same opportunities as employers to avoid unfair labor practice liability when they reverse and cure unlawful actions of their locals. As shown in the Counterstatement, the Union vacated its alleged unlawful action before a complaint was even issued, and there is no record evidence that the proceedings were irregular, or that the Local or the International acted in bad faith, or as part of a pattern of harassment of employee members who file charges with the Board. Under these circumstances, the Board is warranted in concluding that there has not been a violation of Section 8(b)(1)(A) of the Act. See N.L.R.B. v.

Columbia Typographical Union, supra, 470 F. 2d at 1275. Thus, the Board's dismissal of the complaint in this case is in full accord with the LMRDA policy of encouraging responsible union self-government, with sound principles of judicial and administrative economy, and with settled law finding no violation where overall union or employer conduct has no coercive tendency.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the petition for review should be denied.

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November 1977.

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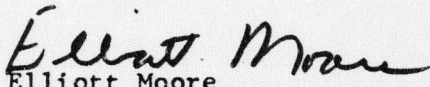
CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following parties at the addresses listed below:

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Dated at Washington, D.C.

this 21st day of November, 1977.